UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:	**EDUCATIONAL TESTING SERVICE PRAXIS PRINCIPLES OF LEARNING AND TEACHING: GRADES 7-12 LITIGATION**	**MDL NO. 1643** **SECTION: R(5)** **JUDGE VANCE** **MAGISTRATE JUDGE CHASEZ**

THIS DOCUMENT RELATES TO: ALL CASES

JOINT REPORT NO. 1 OF PLAINTIFFS' LEAD COUNSEL AND DEFENDANT, EDUCATIONAL TESTING SERVICE

Plaintiffs' Lead Counsel and Defendant, Educational Testing Service (ETS), jointly submit this Report No. 1.

1. **Stipulations on Document Retention, Preservation, Confidentiality, and ETS's Communications with Putative Class Members under PTO2 - ¶7**

The Court on January 24, 2005, entered Pretrial Order No. 2 (PTO2) and ordered the parties to submit written stipulations as to document retention, preservation, confidentiality, and ETS's communications with putative class members. On March 8, 2005, the parties filed Joint Stipulation and Order for Preservation of Documents and Communications with Putative Class Members with attached order, which is attached as Exhibit "A."

The Parties have only one open issue regarding a Joint Stipulation and Order of Confidentiality ("Joint Stipulation"), with the Parties agreeing on all other issues. The issue in contention is on page 6 of the Joint Stipulation which was highlighted and flagged on the copy hand-delivered to chambers on March 8, 2005, and is attached as Exhibit "B."

A. Plaintiffs' Position:

After extensive negotiations on numerous aspects of the Joint Stipulation, the Parties were able to reach consensus on all issues except Defendant's demand for advance disclosure of identity of consulting and testifying experts and employees of such experts (collectively "Outside Experts") to whom Plaintiffs intend to provide "ATTORNEYS ONLY" materials.

In designating protected materials, Defendant has divided those materials into two categories– "CONFIDENTIAL"and "ATTORNEYS ONLY." "CONFIDENTIAL" is defined in ¶2 of the Joint Stipulation as "Information that the Producing Person treats as proprietary or confidential in its business, as well as personal information that relates to an identifiable individual (e.g., social security number)" and "ATTORNEYS ONLY" is defined as "Materials that constitute, reflect or reveal secured test question information." While in the course of negotiations Defendant agreed to significantly narrow the scope of the definition of "ATTORNEYS ONLY" materials and the Joint Stipulation in ¶4B(3) permits Plaintiffs to provide "ATTORNEYS ONLY" materials to "consulting and testifying experts and employees of such experts," as long as such persons have read the Joint Stipulation and have signed and delivered Exhibit A attached thereto to retaining counsel. However, Defendant insists upon the added requirement that Plaintiffs advise "opposing counsel of the identity of such persons, in

advance of disclosure and give[n] [Defendant] ten (10) business days in which to make any appropriate applications to the Court concerning the disclosure."

For several reasons, Plaintiffs cannot agree to this requirement. First, there is no need for this added layer of security as all persons receiving these materials, including Outside Experts, will be bound by the terms of this Joint Stipulation and be subject to this Court's contempt powers for any violation thereof. While Defendant apparently fears that being held in contempt will not afford it adequate protection in the event of disclosure of this allegedly sensitive material, it has made no showing that Plaintiffs' Outside Experts might intentionally violate the Joint Stipulation or why Plaintiffs' Outside Experts should be treated any differently from other persons entitled to receive "ATTORNEYS ONLY" materials. Second, Plaintiffs must be able to freely communicate and coordinate pre-trial proceedings with their Outside Experts without being required to identify those persons to Defendant before sharing discovery materials with them. Outside Expert communications fall within the sacred realm of attorney's work product and Plaintiffs are entitled to plan and develop case strategy without interference from or notification to Defendant. And third, taken to its logical end, Defendant's requirement of advance notification is a potential grant of veto power to Defendant over the choice of Plaintiffs' Outside Experts. Granting Defendant such power will have a chilling effect upon Plaintiffs' ability to litigate this action in the manner they see fit. Accordingly, Plaintiffs urge that the requirements sought to be imposed by Defendant not be adopted by the Court.

B. Defendant's Position:

ETS seeks a provision that would provide for ten days notice and an opportunity to object prior to the dissemination of secure test questions and answers to a third party testifying or

consulting expert witness. ETS expects to submit to the Court this afternoon a brief memorandum detailing the authorities supporting entry of the type of protective-order provision it seeks.

The Parties intend to submit this issue to the Court for guidance at the next Status Conference.

2. Class Certification Discovery Plan (PTO2 - ¶5)

As directed by PTO2, paragraph 5, the Parties have met to discuss the issue of a Class Certification Discovery Plan and have prepared the proposed Joint Discovery Plan, which is attached as Exhibit "C." The Parties have not reached agreement as to the number of depositions each side shall be permitted to take, and intend to submit this issue to the Court for guidance at the Status Conference.

A. Plaintiffs' Position:

After extensive discussions between the Parties, all aspects of the Joint Discovery Plan have been agreed upon except for the number of depositions which may be taken by Plaintiffs and Defendant prior to class certification. In discussing this issue, Defendant initially proposed that Plaintiffs be limited to ten (10) depositions and Defendant be entitled to twenty-five (25). Plaintiffs rejected this proposal as they bear the burden of establishing the requisites for class certification and are unable to predict, at this stage of the litigation, the number of depositions which they might need in the course of satisfying their burden. However, Plaintiffs offered to limit their depositions to twenty-five (25), which offer was rejected by Defendant. Although the Parties have extensively negotiated this issue in good faith, they have been unable to reach consensus.

Plaintiffs are comfortable with the Court making the ultimate determination on the limitation, if any, in the number of depositions which may be taken by the Parties at this stage of the proceedings, but request that if a limitation be imposed by the Court, the Court allow an increase in the number set with good cause shown. As the issue in dispute between the Parties is the number of depositions each party is entitled to take in the pre-certification discovery phase, Plaintiffs will not address the accuracy of ETS's statement that it has a right and is entitled to putative Class members' depositions. This assertion is inaccurate. *Manual for Complex Litigation, Fourth*, §21.14.

B. Defendant's Position:

ETS seeks to modify Federal Rule of Civil Procedure 30(a)(2) to entitle ETS to take up to 25 depositions. ETS anticipates that these depositions will be comprised of depositions of some or most (but not all) of the Plaintiffs named in the various complaints that make up this consolidated action, as well as certain unnamed putative class members. ETS has an obvious right to depose all of the party Plaintiffs that have filed suit against it, and thus plainly would have a right to depose all of the named Plaintiffs, of which there are many more than 25. The Plaintiffs, after all, know what showing, if any, they expect to make as to typicality, adequacy of representation, and predominance of common issues as among the myriad Plaintiffs and putative class members; ETS does not, and it is entitled to discover what that showing is and to test the facts Plaintiffs may rely on through cross-examination.

In addition, ETS needs to depose at least some of the putative class members who are not named Plaintiffs to show that Plaintiffs cannot meet the adequacy, superiority, manageability, or typicality requirements. The Plaintiffs who have brought suit are necessarily a self-selected

sampling, and are not representative of many of the putative class members whom they claim to typify. ETS is not seeking broad based discovery of the unnamed putative class members, only a limited number of depositions necessary to illustrate the differences among the putative class members. Although Plaintiffs suggest that deposing any unnamed putative class member is impermissible, that discovery is contemplated by the Manual for Complex Litigation (to which the Court directs the parties for guidance in Order # 1), and other authorities, which will be presented at the status conference. There is no risk of inconvenience to or undue pressure on unnamed class members. These depositions will be few in number; ETS expects that many of the deponents will have no objection whatever to being deposed, and Plaintiffs' counsel will ably defend their interests in all events. ETS would not object to reasonable time limits less than seven hours for any unnamed-class-member deposition.

ETS believes that Rule 30(a)(2) should not be modified for Plaintiffs. Unlike the consolidated group of named Plaintiffs, ETS is one entity. There is no real dispute that much (though not all) of any required liability showing would involve common issues. Accordingly, the Plaintiffs are entitled only to the number of depositions that any other party facing a single adversary receives.

3. Administrative Master Complaint

As directed by PTO2, paragraph 3, the Plaintiffs will file the Administrative Master Complaint on March 10, 2005.

4. Voluntary Disclosures

As directed by PTO2, paragraph 4, the Parties will serve their respective Rule 26 (a) voluntary disclosures on March 10, 2005.

5. **Remand motion**

The Motion to Remand in Miller v. ETS, et al., Civ. A. No. 04-3436 has been fully briefed by the Parties, as directed by PTO2, paragraph 3.

6. **Report of State Court Litigation Liaison**

Christopher Seeger will present the status of related state court litigation. A copy of Judge Jacobson's order dismissing without prejudice the Jones v. ETS action in Morris County, New Jersey is attached as Exhibit "D."

7. **Next Status Conference Date**

The Court will set the next Status Conference date.

Respectfully submitted,

Dawn M. Barrios (# 2821)
BARRIOS, KINGSDORF & CASTEIX, L.L.P.
701 Poydras Street, Suite 3650
New Orleans, LA 70139-3650
Telephone: (504) 524-3300
Facsimile: (504) 524-3313

Plaintiffs' Lead Counsel

A. Stephen Hut, Jr. by Dawn Barrios with permission
Bruce M. Berman
Jonathan E. Paikin
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

Attorneys for Defendant, Educational Testing Service

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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THIS DOCUMENT RELATES TO ALL CASES

JOINT STIPULATION AND ORDER FOR PRESERVATION OF DOCUMENTS AND COMMUNICATIONS WITH PUTATIVE CLASS MEMBERS

A. Scope

This Stipulation and Order applies to all parties during the pendency of this litigation and governs the preservation of documents as defined in Rule 34 of the Federal Rules of Civil Procedure relating to facts at issue in the litigation ("Discoverable Information").

B. Documents and Data to Be Preserved

1. Electronic Documents and Databases

E-mails. Electronic mail ("e-mail") containing Discoverable Information shall be preserved in electronic form, in an accessible standard format, and on standard

EXHIBIT A

media. The parties shall take reasonable steps to prevent any modification, alteration, or deletion to e-mails from their original state.

"Office" documents. Word processing files, computer presentations (e.g., PowerPoint slides), and spreadsheets (e.g., Excel) containing Discoverable Information shall be preserved in electronic form, in an accessible standard format, and on standard media. The parties shall take reasonable steps to prevent any modification, alteration, or deletion of such documents from their original state.

Databases. Databases (including all records, field, and structural information in such databases) containing Discoverable Information shall be preserved as used and maintained in the ordinary course of business (including any forms and variations thereof). The parties shall take reasonable steps to prevent any modification, alteration, or deletion of the data in such databases but may continue to use such databases and add data to the extent that it does not cause data to be deleted.

Research Materials. Electronically stored research and/or reference literature and materials containing Discoverable Information shall be preserved as maintained in the ordinary course of business, whether electronically or in image form. The parties shall take reasonable steps to prevent any modification, alteration, or deletion of such documents.

Other. All other electronic documents not specifically described herein containing Discoverable Information shall be preserved and the parties shall take

reasonable steps to prevent any modification, alteration, or deletion of such documents.

2. **Paper Documents.** The parties shall retain all paper documents containing Discoverable Information in their original version including, but not limited to, writings, graphs, charts, drawings, correspondence, letters, contracts, memoranda, reports, notes, drafts, handwritten notations, telephone messages, calendars, printed versions of information captured electronically, edited versions of information captured electronically (including handwritten notes on emails), and all such other Discoverable Information existing in printed format.

3. **Communications with Putative Class Members**: Pursuant to Local Civil Rule 23.D.3., counsel for the parties shall preserve and retain in their files, until the final conclusion of this action, a copy of all communications with any members of the putative class or classes described in the complaints in this consolidated action.

4. **Preservation of Discoverable Information:** During the pendency of this litigation, the parties shall maintain document and data retention policies reasonably designed to ensure the retention of Discoverable Information without modifications or deletions unless a true and correct copy of each such data file has been made and preserved for this litigation. In connection therewith, the parties shall suspend the routine or automatic disposal and deletion of discoverable electronic information and paper documents, including, but not limited to, the automatic deletion of electronic mail or removal of unused electronic data and

files. Notwithstanding the other provisions of this Order, as of the date of this Order, persons may generate documents in the future without preserving dictation, drafts, interim versions, or other temporary compilations of information if such documents would not have been preserved in the ordinary course of business.

SO ORDERED.

New Orleans, Louisiana, this ____ day of _____, 2005.

_____
United States District Court Judge

AGREED AND CONSENTED TO BY:

A. Stephen Hut, Jr., Esq. by Dawn Barrios with permission
Bruce M. Berman, Esq.
Jonathan E. Paikin, Esq.
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

Attorneys for Defendant,
Educational Testing Service

Dawn Barrios, Esq. (# 2821)
BARRIOS, KINGSDORF &
CASTEIX, L.L.P.
701 Poydras Street, Suite 3650
New Orleans, LA 70139-3650
Telephone: (504) 524-3300
Facsimile: (504) 524-3313

Plaintiffs' Lead Counsel

UNITED STATES DISTRICT COURT
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JOINT STIPULATION AND ORDER OF CONFIDENTIALITY

All parties to this case stipulate and agree as follows:

1. Scope of Agreement

This Stipulation and Order of Confidentiality ("Order") shall govern the production and exchange of all documents, deposition testimony, interrogatory answers, responses to requests for admission, and other information produced, disclosed, given, or exchanged by and among the parties (and non-parties if requested by letter to counsel for the parties to join herein) (collectively, "Producing Persons") in the course of this action (collectively, "Materials").

2. Protected Material

A Producing Person may designate as "CONFIDENTIAL" or "ATTORNEYS ONLY" those Materials that it reasonably and in good faith believes constitute or contain information that

falls within the following definitions:

"CONFIDENTIAL" — Information that the Producing Person treats as proprietary or confidential in its business, as well as personal information that relates to an identifiable individual (e.g., social security number).

"ATTORNEYS ONLY" — Materials that constitute, reflect or reveal secure test question information.

Materials designated as "CONFIDENTIAL" or "ATTORNEYS ONLY" are collectively referred to herein as "Protected Material."

3. Designation of Protected Material

A. Designation of Tangible Materials, Including Documents, Interrogatory Answers, and Responses to Requests for Admission

Designation shall be made by affixing on the document or material containing the Protected Material, and upon each page so designated, a legend that states: "CONFIDENTIAL" or "ATTORNEYS ONLY" or a similar legend that reasonably identifies the category of protection for the Protected Material. Any claim of "CONFIDENTIAL" or "ATTORNEYS ONLY" as to any document or material containing Protected Material shall be made upon production. A Producing Person, however, need not designate Materials that it makes available for examination by a Party for the purpose of allowing that Party to determine which items in those Materials the Party desires to copy; materials made available for such examination shall be treated as if they had been designated as "ATTORNEYS ONLY" until copies are requested and supplied. Thereafter, all copies supplied shall be treated as Protected Material only if the copies supplied are designated as Protected Material pursuant to this paragraph. Publicly issued or disseminated documents may not be designated as "CONFIDENTIAL" or "ATTORNEYS ONLY" Material. Documents given to the Producing Person by a third party may not be

designated as "CONFIDENTIAL" or "ATTORNEYS ONLY" unless that third party is a consultant, contractor, attorney retained by the Producing Person or other party with whom there is a confidential relationship, and the documents otherwise meet the definition of "CONFIDENTIAL" or "ATTORNEYS ONLY."

To the extent that electronic documents or files are produced, they may be designated either by the inclusion of the appropriate legend within a "field" associated with each document or file, or by affixing the appropriate legend to the disk or other electronic medium used for production. If electronic documents or data are printed or otherwise copied in any way by any party receiving such documents or data, the receiving party shall affix the appropriate legend to the print-out or copy.

The Producing Person shall provide a log of all documents and material designated as "CONFIDENTIAL" or "ATTORNEYS ONLY" which shall identify the Bates numbers, the type of document, the source of the document, the date of the document and whether the document is an attachment to another document. Alternatively, where the Producing Person produces an index to its produced documents, that index shall indicate in an appropriate field whether the Discovery Material is "CONFIDENTIAL" or "ATTORNEYS ONLY".

B. Designation of Deposition Testimony

Designation shall be made by making such a designation on the record at the deposition or by sending written notice to the parties and the court reporter within ten (10) business days after the date of the deposition. If a Producing Person has advised the court reporter that Protected Material has been disclosed during a deposition, the court reporter shall include on the cover page the following information: "DEPOSITION CONTAINS [CONFIDENTIAL INFORMATION OR INFORMATION FOR ATTORNEYS ONLY] SUBJECT TO THE

PROTECTIVE ORDER. Within fifteen (15) days of receipt of the initial deposition transcript, the Producing Person shall advise the court reporter and counsel for the Parties of the specific pages and lines in which the Protected Material appears. The court reporter shall supplement the transcript to mark the specific pages and lines designated as Protected Material and amend the cover page to reflect that these specific designations have been made. Counsel shall have immediate access to the deposition transcript, but prior to page and line designations, shall treat the entire transcript as "CONFIDENTIAL" or as for "ATTORNEYS ONLY," as appropriate.

4. Protections Afforded Protected Material

Protected Material shall be used and disseminated only for purposes of prosecuting and defending this action and any related state court litigation, provided that the court and parties in any such state court litigation agree to be bound by the terms of this Stipulation and Order. Protected Material shall not be used or disseminated for any other purpose whatsoever. All summaries, compilations, notes, copies, electronic images, or databases containing information designated as Protected Material shall be subject to the terms of this Order to the same extent as the Protected Material themselves.

Protected Material shall be maintained in confidence by the persons to whom it is furnished and may be disclosed by such persons only to other persons entitled to have access to the Protected Material under the provisions of ¶¶ 4.A. and 4.B. of this Order. Any person who makes a disclosure of Protected Material permitted under this Order shall, prior to disclosure, advise the person to whom Protected Materials is to be disclosed of the contents of this Order, and when required by ¶¶ 4.A. and 4.B., require each such person to sign Exhibit A. Unless otherwise provided herein, Counsel for each party shall retain executed copies of Exhibit A. Should an instance occur where Confidential or Attorneys Only information is publicly disseminated, pursuant to appropriate motion, counsel for both plaintiffs and defendants shall file

all executed copies of Exhibit A with the Court for *in camera* review.

A. Protections Afforded Material Designated "CONFIDENTIAL"

Materials designated "CONFIDENTIAL" shall not be provided, shown, made available, or communicated in any way to any person or entity other than the following persons:

(1) The Court, persons employed by the Court, and stenographers and videographers employed at depositions, hearings, or trial;

(2) Counsel for any party in this litigation, including in-house counsel who supervise or assist in this action, and clerical, paralegal, and secretarial staff regularly employed by such counsel;

(3) Employees of third party vendors and/or contractors involved solely in one or more aspects of organizing, filing, copying, coding, converting, storing, or retrieving data so long as the vendor or contractor has a general confidentiality agreement in place with retaining counsel;

(4) Named parties, and officers, directors, and employees of a named party who are (a) actively engaged in assisting that party's attorneys in the conduct of this litigation and/or (b) being deposed in this case;

(5) Non-party deponents, after such persons have read this Order and signed and delivered Exhibit A to the parties;

(6) Persons not employees of any party who are expressly retained as experts to assist a party's attorneys in the preparation of this action for trial, including consulting and testifying experts and the employees of such experts (collectively, "Outside Experts"), after such Outside Expert has read this Order and signed and delivered Exhibit A to retaining counsel;

(7) Persons who are identified in the materials designated CONFIDENTIAL as having previously had access to or previously seen the materials; and

(8) Other persons to the extent reasonably necessary to prosecute or defend this action after such other persons have read this Order and signed and delivered Exhibit A to the parties.

B. Protections Afforded Material Designated as "ATTORNEYS ONLY"

Information designated as "ATTORNEYS ONLY" shall not be provided, shown, made available, or communicated in any way to any person or entity other than the following persons:

(1) The Court, persons employed by the Court, and stenographers and videographers employed at depositions, hearings, or trial;

(2) Counsel for any party in this litigation, including in-house counsel who supervise or assist in this action, and clerical, paralegal, and secretarial staff regularly employed by such counsel;

(3) Persons not employees of any party who are expressly retained as experts to assist a party's attorneys in the preparation of this action for trial, including consulting and testifying experts and the employees of such experts (collectively, "Outside Experts"), after such Outside Expert has read this Order and signed and delivered Exhibit A to retaining counsel; and provided that the Producing Person is advised by opposing counsel of the identity of such persons in advance of disclosure and given ten (10) business days in which to make any appropriate applications to the Court concerning the disclosure. If there is an objection by the Producing Person, no disclosure shall be made to the Outside Expert until the Court has ruled on the objection.

5. Objection to Designation

A party may object to the designation of Materials as "CONFIDENTIAL" or "ATTORNEYS ONLY" by providing written notice of the specific designated Material to which the challenging party objects to all parties and to the Producing Person. A party shall not be obligated to challenge the propriety of a designation upon production or designation, and a

failure to do so shall not preclude a subsequent challenge thereto. Within 14 days of such a challenge, the person that produced such material shall then respond in writing, setting forth the reasons that person believes the "CONFIDENTIAL" or "ATTORNEYS ONLY" material should be treated as "CONFIDENTIAL" or "ATTORNEYS ONLY". If the parties, upon meeting and conferring, are thereafter unable to agree on whether particular "CONFIDENTIAL" or "ATTORNEYS ONLY" material shall be treated as "CONFIDENTIAL" or "ATTORNEYS ONLY", the producing party must move the Court, within 30 days of the initial written notice challenging the designation of the material as "CONFIDENTIAL" or "ATTORNEYS ONLY" for an order pursuant to Rule 26(c) and shall have the burden of establishing that the "CONFIDENTIAL" or "ATTORNEYS ONLY" designation was reasonable for the purpose of achieving the protection for confidential and sensitive information contemplated by this Order. The obligation to bring the first motion shall fall upon the Producing Person. The challenging party shall be obliged to file the second motion, if any. Thereafter, the obligation to bring the subsequent motions shall alternate in the same way, but at all times, the burden of establishing that the "CONFIDENTIAL" or "ATTORNEYS ONLY" designation was reasonable shall remain with the Producing Person. Nothing in the preceding paragraph shall prevent any receiving party from challenging any designation on an expedited basis. Until such time as the Court orders that the material in dispute be de-designated (or designated within a lower category of protection), the material must be treated in accordance with its designation.

6. Use of Protected Material in Court Proceedings

In the event that any Protected Material is used in any court proceeding in connection with this litigation, it shall not lose its "CONFIDENTIAL" or "ATTORNEYS ONLY" status through such use, and the parties shall take all steps reasonably required to protect its confidentiality during such use. If at any point a party wishes to file or submit to the Court any

pleadings, deposition transcripts, documents, discovery responses, or other information containing Protected Material, the party will submit two copies of the filing in an envelope labeled "Sealed-Subject to Court Order." The first page of each submission or filing that contains Protected Material shall contain the phrase: "Confidential — Subject to Court Order." Where possible, only those portions that contain Protected Material shall be filed under seal.

7. Error in Designation or Production

The inadvertent or unintentional production or disclosure of documents that contain Protected Material without appropriate designation at the time of the production or disclosure shall not be deemed a waiver in whole or in part of a Producing Person's claim of protection, either as to the specific information disclosed or as to any other information relating thereto or on the same or related subject matter. Inadvertent or unintentional production or disclosure of documents that contain Protected Material without appropriate designations can be remedied by supplemental written notice sent to all parties at any time prior to trial. Upon such written notice, arrangements shall be made for the destruction of all unlegended copies and for substitution, where appropriate, of properly legended copies.

8. Use by Persons Producing the Protected Material

Nothing in this Order shall be construed as a restriction on the Producing Person's ability to use or disclose Materials it has designated as Protected Material.

9. No Admission Implied

The authorization contained herein for the Producing Person to designate any information as " CONFIDENTIAL" or "ATTORNEYS ONLY" shall not be construed in any way as an admission or agreement by any party that such information constitutes or contains confidential or competitively-sensitive material.

10. No Preclusion Implied

Nothing in this Order precludes a Producing Person from seeking additional protection from the Court. Additionally, nothing herein shall prevent disclosure beyond the terms of this Order if the Producing Person designating the Protected Material consents to such disclosure, or if the Court, after notice to all parties (and if appropriate, to non-party Producing Persons) orders such disclosure.

11. Production to Non-Parties

In the event any person or party having possession or control of any Protected Material receives a subpoena or other process or Court order to produce such Protected Material, the person or party shall immediately notify the parties (and the Producing Person if a non-party) in writing and provide a copy of such subpoena, process, or Court order. The party receiving such subpoena, process, or Court order to produce such information shall not produce such Protected Material until after the Producing Person has had an opportunity to object to or otherwise move for protection against such disclosure, unless counsel for the party receiving the subpoena, process, or Court order to produce such information concludes in his or her reasonable professional judgment that failure to comply with such subpoena, process, or Court order to produce such information will subject the lawyer, his or her firm, or his or her client to sanction.

12. Conclusion of Lawsuit

This Order shall not terminate at the conclusion of this lawsuit. Upon request of the Producing Person after the entry of a final judgment in this lawsuit, from which no appeal has been or can be taken, all Protected Material, including all copies of such Protected Material, shall be returned to the Producing Person or destroyed. Counsel of record shall notify all parties of compliance with this paragraph of the Order not more than thirty (30) days after compliance. Attorney notes and work product are not covered by this paragraph's requirement that Protected

Material be returned or destroyed, but are subject to all other provisions of this Order. The Court retains jurisdiction to enforce this Order.

13. Modification

The terms of this Order are subject to modification, extension, or limitation as agreed to by all parties in writing, provided that all parties (and any other Producing Person who has requested joinder in this Order) joins in such modification, extension, or limitation with respect to its Protected Material, or by order of the Court.

SO ORDERED.

New Orleans, Louisiana, this ____ day of _____, 2005.

_____
United States District Court Judge

AGREED AND CONSENTED TO BY:

_____
A. Stephen Hut, Jr., Esq.
Bruce M. Berman, Esq.
Jonathan E. Paikin, Esq.
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

Attorneys for Defendant,
Educational Testing Service

_____
Dawn Barrios, Esq. (# 2821)
BARRIOS, KINGSDORF &
CASTEIX, L.L.P.
701 Poydras Street, Suite 3650
New Orleans, LA 70139-3650
Telephone: (504) 524-3300
Facsimile: (504) 524-3313

Plaintiffs' Lead Counsel

EXHIBIT A

STATEMENT

1. I am familiar with and agree to be bound by the terms of the Stipulation and Order of Confidentiality ("Order") entered in In re Educational Testing Service Praxis Principles of Learning and Teaching: Grades 7-12 Litigation, MDL 1643.

2. I will not reveal the contents or substance of "CONFIDENTIAL" or "ATTORNEYS ONLY" materials to any unauthorized person.

3. I will not use "CONFIDENTIAL" or "ATTORNEYS ONLY" materials for any purpose other than the prosecution or defense of claims in this lawsuit.

4. I will maintain all "CONFIDENTIAL" or "ATTORNEYS ONLY" materials in a secure manner to prevent unauthorized access to them. I will only make such copies of or notes concerning documents designated "CONFIDENTIAL" or "ATTORNEYS ONLY" as are necessary to enable me to render the assistance required in connection with this lawsuit, and all such notes and copies shall be preserved in a separate file maintained as confidential and marked for disposal or destruction upon completion of this litigation.

5. I consent to the jurisdiction of the United States District Court for the Eastern District of Louisiana with regard to any proceedings to enforce the terms and conditions of this Order.

6. I understand that failure to abide by the Order may subject me to sanctions for contempt of Court.

DATED this _____ day of _____, 20____.

By:_____

Name: _____
(print name)

Address:_____
_____
_____

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE:	**EDUCATIONAL TESTING SERVICE PRAXIS PRINCIPLES OF LEARNING AND TEACHING: GRADES 7-12 LITIGATION**	**MDL NO: 1643** **SECTION: R(5)** **JUDGE VANCE** **MAG. JUDGE CHASEZ**

THIS DOCUMENT RELATES TO: ALL CASES

PRETRIAL ORDER #___

(Class Certification Discovery)

Pretrial Order #2 is modified such that the Plaintiffs shall file their class certification motion within 150 days from the date of the filing of Defendant's answer to the master complaint. This Order establishes a schedule for the conduct of discovery related to the issue of class certification. Accordingly, it is ORDERED that:

1. **Discovery by Plaintiffs**

Commencing with the filing of Defendant's answer to the master complaint, Plaintiffs shall be entitled to propound additional written discovery with respect to class certification issues. Objections and Responses to written discovery shall be due 30 days after service of the written discovery. Plaintiffs may serve interrogatories to the extent that Plaintiffs have not used all of the 25 interrogatories allotted for the action pursuant to Fed. R. Civ. P. 33(a). Further, commencing 31 days after the filing of Defendant's answer to the consolidated complaint,

Plaintiffs shall be entitled to take depositions. Plaintiffs shall be entitled to take no more than ___ depositions. Depositions shall take place at a location near the residence of the deponent, or at any other location agreed upon by the parties and the deponent. Pursuant to Fed. R. Civ. P. 30(d)(2), each deposition shall be limited to one day of seven hours. Deposition of ETS's Rule 30(b)(6) witness shall be limited to two days, except based upon a good cause showing.

2. Plaintiffs' Designation of Fact Witnesses

Plaintiffs shall make an initial designation of known fact witnesses whose testimony they may offer at the class certification hearing by 75 days after the filing of Defendant's answer to the master complaint and shall supplement such designation, if necessary, at the time the Motion to Certify Class Action is filed.

3. Discovery by Defendant ETS

Commencing with the filing of Defendant's answer to the master complaint, Defendant shall be entitled to propound additional written discovery with respect to class certification issues. Objections and Responses to written discovery shall be due 30 days after service of the written discovery. Defendant may serve interrogatories to the extent that Defendant has not used all of the 25 interrogatories allotted for the action pursuant to Fed. R. Civ. P. 33(a) Further, commencing 31 days after the filing of Defendant's answer to the master complaint, Defendant shall be entitled to take depositions. Defendant shall be entitled to take up to __ depositions. Depositions shall take place at a location near the residence of the deponent, or at any other location agreed upon by the parties and the deponent. Pursuant to Fed. R. Civ. P. 30(d)(2), each deposition shall be limited to one day of seven hours.

4. Defendant's Designation of Fact Witnesses

Defendant shall make an initial designation of known fact witnesses whose testimony they may offer at the class certification hearing by 105 days after the filing of Defendant's

answer to the master complaint and shall supplement such listing, if necessary, at the time the Opposition to the Motion to Certify Class Action is filed.

5. Disclosure/Discovery of Plaintiffs' Experts

Plaintiffs shall furnish to Defendant expert reports with respect to class certification issues in accordance with Fed. R. Civ. P. 26(a)(2)(B) and dates of availability of their experts for depositions by 90 days after the filing of Defendant's answer to the master complaint. Depositions of each expert shall be limited to two days, except based upon a good cause showing.

6. Disclosure/Discovery of Defendant's Experts

Defendant shall furnish to Plaintiffs expert reports with respect to class certification issues in accordance with Fed. R. Civ. P. 26(a)(2)(B) and dates of availability of their experts for depositions by 135 days after the filing of Defendant's answer to the master complaint. Depositions of each expert shall be limited to two days, except based upon a good cause showing.

7. Class Action Discovery Deadline

The parties shall complete the depositions of all fact and expert witnesses by 150 days after the filing of Defendant's answer to the master complaint. If additional fact witnesses are disclosed by either party, such disclosure shall be made in sufficient time prior to the class certification hearing so that a reasonable opportunity to take discovery is provided to the other side, without prejudice to any party.

8. Trial Plan

Plaintiffs shall submit a proposed Trial Plan and outline for all class-wide relief at the time the Motion for Class Certification is filed. Defendant shall submit a Response to the proposed Trial Plan at the time the Opposition to the Motion for Class Certification is filed.

SO ORDERED.

New Orleans, Louisiana, this ____ day of _____, 2005.

_____
United States District Court Judge

BUCHANAN INGERSOLL PC
700 Alexander Park, Suite 300
Princeton, New Jersey 08540
(609) 750-7600
Attorneys for Defendant
EDUCATIONAL TESTING SERVICE

KATHLEEN CONLEY JONES, individually and on behalf of all others similarly situated,

Plaintiff,

v.

EDUCATIONAL TESTING SERVICE,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

Docket No. 1977-04

Civil Action

ORDER DISMISSING ACTION WITHOUT PREJUDICE

THIS MATTER having been brought before the Court by defendant Educational Testing Service ("ETS") on its Motion to Dismiss Without Prejudice or, in the Alternative, To Stay This Action; and this Court having considered the arguments of counsel, and for good cause shown; as set forth in the court's written decision of February 7, 2005;

IT IS on this 7th day of February, 2005,

ORDERED that this action be dismissed without prejudice, and without costs awarded to any party against any other.* If no prior action is adjudicated on the merits, Plaintiff shall have leave to apply to reinstate this action.

Mary C. Jacobson, J.S.C.

* In light of this dismissal, all pending motions are dismissed as moot, including any undecided motions for the pro hac vice admission of counsel.

EXHIBIT D

NOT FOR PUBLICATION WITHOUT APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY
DOCKET NO. MER-L-1977-04

KATHLEEN CONLEY JONES,
individually, and on
behalf of all others
similarly situated,

Plaintiff,

v.

EDUCATIONAL TESTING SERVICE,

Defendant.

Defendant's Motion to Dismiss Without Prejudice, or in the Alternative, Stay the Action.

Argued: December 3, 2004

Decided: February 7, 2005

A. Stephen Hut, Jr., Esq., Wilmer, Cutler, Pickering, Hale & Dorr, L.L.P., admitted Pro Hac Vice, and Mary Sue Henifin, Esq., Buchanan Ingersoll, P.C., for Defendant ETS

Seth A. Katz, Esq., Seeger Weiss, L.L.P., admitted Pro Hac Vice, and Roopal P. Luhana, Esq., Seeger Weiss, L.L.P., for Plaintiff Kathleen Jones

The Opinion of the Court was delivered by:

JACOBSON, J.S.C.

Plaintiff, Educational Testing Services [hereinafter ETS], is a non-profit corporation organized under the New York Education Law with its principal place of business located in Princeton, New Jersey. ETS develops and administers educational assessments, including the Praxis series of tests that are used to assess beginning teachers. These tests are used by state education agencies to make licensing determinations. This litigation focuses on the Praxis Principles of Learning and Teaching: Grades 7-12 [hereinafter PPLT], which is one of the many Praxis exams ETS develops, administers and scores.

In 2004, ETS discovered a statistical anomaly in its scoring of the PPLT exams taken between January 2003 and April 2004. This anomaly resulted in lower scores for teacher candidates in nineteen states.[1] Upon a re-scoring of those exams, approximately 4,100 candidates who had initially received failing scores received passing scores. Beginning on July 10, 2004, ETS made personal phone calls to all affected candidates, to states using the PPLT, and to clients of ETS in other states. ETS then sent letters explaining the situation with updated scores attached. Lastly, ETS refunded the registration and test fees of all the affected candidates.

[1] The nineteen states are Arkansas, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Mississippi, Nevada, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah and West Virginia. New Jersey is not among the affected states, and ETS asserts that no individual in New Jersey was affected by the scoring anomaly.

Plaintiff, Kathleen Conley Jones, is a resident of Georgia who took the PPLT on November 15, 2003. She was a resident of Louisiana when she took the exam. In December 2003, ETS informed her that she had failed the exam. As a result, plaintiff was unable to obtain her teaching certificate in Louisiana. In July 2004, ETS informed plaintiff that she had in fact passed the exam. Plaintiff Jones subsequently filed this lawsuit in New Jersey.

PROCEDURAL HISTORY

Beginning on July 15, 2004, class action lawsuits concerning the Praxis scoring anamoly were filed against ETS. On July 28, 2004, plaintiff filed this class action lawsuit in Mercer County where ETS has its headquarters. Prior to the filing of this lawsuit, eight Praxis test class actions were filed in various federal courts and more have been filed after this suit. After ETS was served with plaintiff's complaint, nine more class actions were filed in various courts as of December 2004, including three in Mercer County.[2] Thus, there

[2] The two cases filed in Mercer County are Mary Mathis-Cooper v. Educational Testing Service, Docket Number MER-L-2274-04, and Jonathan Arnold v. Educational Testing Service, Docket Number MER-L-2856-04. Mary Mathis-Cooper v. Educational Testing Service was voluntarily stayed until February 1, 2005.

are at least twenty pending actions, in addition to the one before this court, which arise from the same nucleus of facts.

On August 12, 2004, ETS filed a motion pursuant to 28 U.S.C. § 1407[3] before the Federal Judicial Panel on Multidistrict Litigation [hereinafter MDL Panel] asking the MDL Panel to take jurisdiction over the then-known pending federal actions against ETS and to transfer those actions to the Eastern District of Louisiana where all of those cases as well as any future federal cases could be consolidated for pre-trial proceedings. On that same day, plaintiff's attorney filed a complaint in New Jersey state court on behalf of Kathleen Jones and filed as well three other virtually identical complaints in the Eastern District of Louisiana, the Western District of Louisiana, and the District of New Jersey. On December 16, 2004, the MDL Panel issued an Order transferring all related federal proceedings to the District Court of the Eastern District of Louisiana for

[3] 28 U.S.C. §1407(a) states:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

The remainder of the statute details the organization of the MDL Panel and the procedures for consolidated pre-trial proceedings.

consolidation. However, ETS cannot seek to remove plaintiff's complaint to federal court so that it can be consolidated under the MDL Panel's Order because 28 U.S.C. §1441(b)[4] prohibits such removal if a defendant is a resident of the forum state. Thus, defendant ETS seeks to dismiss this action without prejudice or, in the alternative, to stay it pending resolution of the federal litigation.

DISCUSSION

Under 28 U.S.C. §1441(b), plaintiff's complaint cannot be removed to federal court because the defendant, ETS, has its principal place of business in New Jersey and is therefore a resident of New Jersey. Consequently, to avoid litigation here that would be duplicative of the federal proceedings, ETS has moved to stay this lawsuit or to dismiss it without prejudice until the federal actions are resolved. This application is based in part on principles of comity - the recognition that one sovereignty gives to the legislative, executive or judicial acts of another. Exxon Research and Engineering Company v.

[4] 28 U.S.C. §1441(b) states:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Industrial Risk Insurers, 341 N.J. Super. 489, 503 (App. Div. 2001). The doctrine is grounded in the "policy of avoiding conflicts in jurisdiction . . ." Id. (citing Fantory v. Fantory, 21 N.J. 525, 533 (1956)).

The general rule in New Jersey is that the court first acquiring jurisdiction has precedence absent special equities. Bass ex rel. Will of Bass v. DeVink, 336 N.J. Super. 450, 455 (App. Div. 2001); see also Exxon, 341 N.J. Super. at 505; Cogen Technologies v. Boyce Engineering Int'l, Inc., 241 N.J. Super. 268, 273 (App. Div. 1990). When an already pending suit in another jurisdiction presents the same claims and arises from the same set of facts,

> Respect for our sister states and the strong public policy in favor of marshaling judicial resources require abstention in these circumstances. "There is ordinarily no reason to entertain subsequent local litigation paralleling an already instituted action in another state." An action may, "as a matter of sound discretion," be stayed by a court until the prior litigation has been adjudicated. [Bass, 336 N.J. Super. at 455-56 (citations omitted)]

See also Kaselaan & D'Angelo Associates, Inc. v. Soffian, 290 N.J. Super. 293, 300 (App. Div. 1996)(applying general rule of comity when the prior action is pending in federal court). "The fact that an action pending in another state involves the same parties and the same or substantially similar claims does not bar prosecution of a subsequent action here in New Jersey." American Home Products Corp. v. Adriatic Ins. Co., 286 N.J.

Super. 24, 33 (App. Div. 1995). However, "[a] court having jurisdiction has the authority to refuse to proceed in a vexatious law suit focusing on a matter already proceeding in the courts of another state." Cogen Technologies, 241 N.J. Super. at 272. "[T]he determination whether to stay an action that is related to an action pending in another jurisdiction involves a careful weighing of the interests of the parties as well as the court's interest in conserving its resources." Kaselaan, 290 N.J. Super. at 301. In American Home Products, 286 N.J. Super. at 37, the Appellate Division set out the appropriate framework for determining whether a dismissal or stay is necessary under the principles of comity:

> [W]hen requesting that the court dismiss or stay a New Jersey case for comity reasons, the defendant should be required to establish (1) that there is a first-filed action in another state, (2) that both cases involve substantially the same parties, the same claims, and the same legal issues, and (3) that plaintiff will have the opportunity for adequate relief in the prior jurisdiction. When a defendant establishes these requisites, it has shown a clear entitlement to comity-stay relief and the judge should grant the stay unless plaintiff demonstrates "special equities."

Accord Exxon, 341 N.J. Super. at 506; Bass, 336 N.J. Super. at 456. Thus, ETS bears the initial burden of establishing the these three prerequisites for a comity dismissal or stay have been met in the circumstances of this case.

To meet the first prong, defendant has established that there is an action pending in another state that was filed before plaintiff's complaint. In fact, defendant has established that eight lawsuits were filed in other jurisdictions prior to plaintiff's lawsuit, and that three of these prior suits were filed in Louisiana, the state where one of plaintiff's attorneys practices law and where plaintiff lived when she took the Praxis test that is at the heart of her claims. Plaintiff argues that because each of the prior-filed actions are pending in federal court and not in state court, this prong has not been met. Plaintiff is wrong.

In Kaselaan & D'Angelo Associates, Inc. v. Soffian, 290 N.J. Super. at 300, the issue before the court was whether the plaintiff's state action must be dismissed because plaintiff had previously filed the same action in federal court. Id. at 296. The court concluded that the entire controversy doctrine did not mandate that the simultaneous state action be dismissed, and remanded the case back to the trial court to determine if a stay of the state action was appropriate. Id. at 299, 301. The Kaselaan court did not distinguish between simultaneous actions pending in two different state courts and simultaneous actions pending in state court and federal court, and cited the general rule of comity set forth in American Home Products, 286 N.J. Super. at 331, to be applied in either situation. Kaselaan, 290

N.J. Super. at 300. The principles of comity apply between states and also between the states and the federal government because, at base, they deal with how various sovereignties relate to each other and exercise powers when two or more sovereignties seek to act in the same realm. While comity principles in the federal-state context can involve constitutional issues such as federal preemption and prudential doctrines such as abstention, in the context of the present inquiry -- whether the New Jersey courts should stay a duplicative, later-filed lawsuit while the first case is adjudicated in another forum -- the filing of the first lawsuit in a federal and not a state court is a distinction without a difference. Indeed, the court in Kaselaan noted that the New Jersey courts have the "appropriate means" to address comity situations "when a related case is pending in a federal court or in the court of another state. . ." 290 N.J. Super. at 300. ETS thus has met the first prong of the test.

ETS must next establish that the prior pending lawsuits involve substantially the same parties, claims, and legal issues. ETS argues that plaintiff is a putative class member of the previously filed class action suits and that, accordingly, the parties are the same. In Adams v. Educational Testing Service, Docket Number 2:04-cv-1997, United States District Court for the Eastern District of Louisiana, one of the first

suits filed against ETS, the plaintiff purports to represent himself and a class of similarly situated people, defined as "All individuals who presently reside in the United States of America who took the Praxis P.L.T. test between January 2003 and April 2004 and failed the test as a result of the negligence of ETS." Plaintiff Kathleen Jones is a person, residing within the United States, who took the test in November 2003 and failed based on the initial scoring by ETS. Thus, plaintiff Jones would be encompassed in the class of a previously filed suit.[5]

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[5] Additional previously filed suits would include Ms. Jones as a class member. In Billet v. Educational Testing Service, Docket Number 04-563, originally filed in a Pennsylvania state court and later removed to the United States District Court for the Eastern District of Pennsylvania, the class is defined as "All persons who took the test known as the Praxis Principles of Learning and Teaching for grade 7 through 12 administered by ETS, who received a false failing score from ETS despite the fact that they had actually passed the test, and who were damaged thereby." In Johnson v. Educational Testing Service, Docket Number 2:04-cv-2291, originally filed in the Civil District Court for the Parish of New Orleans, Louisiana, and later removed to the United States District Court for the Eastern District of Louisiana, the class is defined as

> All persons, (including but not limited to the 486 Louisiana residents), who were erroneously told by ETS from 2001 to present that they had indeed failed all or part of the ETS tests necessary for them to receive their teacher certification, also including but not being limited to those persons who were forced to retake the test and passed it but had originally passed it upon the first administration.

The complaint in Brouse v. Educational Testing Service, Docket Number 1:04-cv-1599, filed in the Court of Common Pleas of Erie County, Ohio, and later removed to the United States District Court for the Eastern District of Pennsylvania, states:

> The named plaintiff brings this action on behalf of a Class consisting of all individuals who sat for teacher certification tests administered and graded by Defendant ETS from January 2003 through April of 2004, and who have subsequently been identified as having been mistakenly advised that they failed the tests when, in fact, they passed the tests.

In Kochensky v. Educational Testing Service, Docket Number 2:04-cv-3794, filed in the Court of Common Pleas of Philadelphia County, Pennsylvania, and later removed to the United States District Court for the Eastern District of Pennsylvania, the class is defined as "All persons who took the ETS Praxis examination since January 2003 where ETS gave the individual a non-passing

There is no evidence that Ms. Jones has chosen to opt-out of Adams v. Educational Testing Service or any similar lawsuits. Moreover, Ms. Jones's own definition of the class echoes the class definitions of the other, previously filed complaints. She defines the class as:

> All persons in the United States who took the Praxis Principles of Learning and Teaching for grades 7 through 12 administered by ETS between the dates of January 1, 2003 and May 1, 2004, whose tests were incorrectly scored, erroneously received false failing scores from the ETS, and were damaged thereby.

Plaintiff argues that "though most of the previously filed complaints involve substantially similar parties, allegations, and legal issues, they involve different legal theories and claims." Thus, plaintiff concedes that the parties are substantially similar. It is clear that ETS has shown the parties to be the same.

As to the claims, Ms. Jones alleges negligence and breach of contract. ETS argues that all of the previously filed lawsuits allege negligence and breach of contract.[6] Plaintiff

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grade due to its incorrect scoring of one or more sections of the examination." Lastly, Rutledge v. Educational Testing Service, Docket Number 2:04-cv-03465, filed in the United States District Court for the Eastern District of Pennsylvania, defines the class as:

> All persons in the United States who took the test known as the Praxis Principles of Learning and Teaching for grades 7 through 12 administered by Educational Testing Service, Inc. ("ETS"), who received a false failing score from ETS despite the fact that they had actually passed the test, and who were damaged thereby. The Class is limited to those persons who satisfy the amount in controversy requirement for federal diversity jurisdiction.

[6] For example, Billet v. Educational Testing Service, Docket Number 2:04-cv-3795, United States District Court for the Eastern District of Pennsylvania,

states that her claims differ from the claims in the previously filed complaints because she asserts negligence and breach of contract under New Jersey law. Plaintiff further argues that the claims are not substantially similar because some of the prior actions allege counts other than negligence or breach of contract. However, plaintiff fails to note that all prior-filed claims do allege negligence and breach of contract. Though there may be additional claims such as breach of fiduciary duty, public policy, and violation of civil rights in some of the previously filed complaints, all suits, including this one in New Jersey, allege negligence and/or breach of contract and thus the same proofs are necessary in every suit. Plaintiff makes a general statement that her complaint alleges breach of contract and negligence under New Jersey law, but fails to show how the law in New Jersey regarding those claims is materially different from the state laws that will be applied in federal court. Therefore, not only are the claims of the lawsuits

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and Riehle v. Educational Testing Service, Docket Number 3:04-cv-7430, United States District Court for the Northern District of Ohio, allege negligence and breach of contract. The other previously-filed cases allege as follows: Adams v. Educational Testing Service, Docket Number 2:04-cv-1997, United States District Court for the Eastern District of Louisiana (negligence); Johnson v. Educational Testing Service, Docket Number 2:04-cv-2291, United States District Court for the Eastern District of Louisiana (negligence); Brouse v. Educational Testing Service, Docket Number 1:04-cv-1599, United States District Court for the Northern District of Ohio (negligence and public policy); Kochensky v. Educational Testing Service, Docket Number 2:04-cv-3794, United States District Court for the Eastern District of Pennsylvania (negligence, breach of contract, breach of fiduciary duty, violation of civil rights and equitable relief); and Rutledge v. Educational Testing Service, Docket Number 2:04-cv-03465, United States District Court for the Eastern District Pennsylvania (negligence and breach of contract).

"substantially similar" as American Home Products requires, in some instances the claims are identical. Moreover, a refusal to stay or dismiss an action on the grounds of comity due to the dissimilarity of claims generally involves substantially different claims. Exxon, 341 N.J. Super. at 514. That is not the situation here.

In conjunction with the requirement that there be substantially similar claims is the requirement that there be substantially similar legal issues. ETS argues that the issues presented in Ms. Jones' case are substantially similar to the issues presented in the previously-filed cases. Plaintiff appears to argue in her brief that the legal issues are not substantially similar. However, if the legal claims are substantially similar, it follows that many of the legal issues will be the same. The questions raised by these lawsuits are whether ETS erroneously scored the tests, whether ETS was negligent in doing so, whether ETS was negligent in failing to set up procedures to protect against such an error, and whether or not the plaintiffs suffered damages as a result of the scoring error. These very issues are at the heart of each case, and whether there are additional, more tangential issues to be determined in only one or some of the cases does not refute the fact that the key questions are substantially similar, if not identical. Therefore, defendant ETS has established that the

issues in the previously filed actions are substantially similar.

Lastly, to meet the third prong, defendant must show that plaintiff can obtain adequate relief in the prior jurisdiction. As noted before, plaintiff meets the criteria to be a class member in many of the previously-filed suits. Moreover, the MDL Panel has issued an Order transferring and consolidating all related federal suits into the District Court for the Eastern District of Louisiana. At the time plaintiff took the Praxis test, she was a Louisiana resident. Moreover, plaintiff had her scores sent to Louisiana and intended to teach there. Certainly, plaintiff is not lacking contacts to Louisiana, nor would she be prejudiced if she had to adjudicate her claims in federal court. As stated before, the claims and issues are substantially similar, and based on the parties' submissions, plaintiff has not shown that all relief available to Ms. Jones in the New Jersey courts would not be available to her in federal court.

She nonetheless argues that "while plaintiff may have the opportunity to receive relief in another jurisdiction, plaintiff's relief will be swifter in this court because discovery is moving at a faster pace than the others, and is, indeed, already underway. Therefore, there exists an opportunity for plaintiff to receive quicker relief in this

state action." While plaintiff's chance to obtain quicker relief in this court should be considered when determining special equities, the fact remains that plaintiff can still obtain adequate relief in the other pending suits. Moreover, now that all federal cases have been consolidated for MDL case management in the United States District Court for the Eastern District of Louisiana, discovery is starting and it is not clear that a New Jersey State court action would conclude more quickly.[7] Therefore, defendant has established the third prong.

Because ETS can establish the three prongs required by the court in American Home Products to stay this action, it is entitled to have this matter held in abeyance, unless plaintiff can demonstrate special equities that would make such a result unjust. American Home Products, 286 N.J. Super. at 74. In determining whether special equities exist, a court may consider New Jersey's connection to the controversy or parties, whether or not a stay would thwart the public policy of New Jersey, how well advanced to the trial stage the New Jersey case is in comparison with the first-filed action, and convenience and

[7] Plaintiff cites to In re Pick-up Truck Fuel Tank Prod. Liability Litigation, 1996 WL 683785, at *13 (E.D. Pa. 1996), for the proposition that where there are simultaneous actions pending in federal and state courts, the federal court has no claim of priority to the litigation, as any one of the pending cases could be resolved first and would then have a preclusive effect on the others. First, this decision is unreported. Secondly, the question presented in In re Pick-up Truck was whether the federal court, where consolidated and coordinated cases are pending, should enjoin suits with the same facts and issues from proceeding in state court. Id. at *1. That issue is not before this court, and plaintiff's reliance on In re Pick-up Truck is thus unpersuasive.

fairness to the parties. American Home Products, 286 N.J. Super. at 74. First, New Jersey is connected to this action only because ETS has its principal place of business in Princeton, New Jersey. Plaintiff is a Georgia resident, was a Louisiana resident at the time she took the test in Louisiana, had her scores sent to Louisiana education authorities, and allegedly suffered damages when she was not certified to teach in Louisiana. ETS is a New York corporation. In addition, ETS asserts that no resident of New Jersey was affected by the erroneous scoring, and that no one who took the test in or sent scores to New Jersey was affected. Therefore, the putative class of plaintiffs is not connected to New Jersey at all, and the effects of the alleged wrongful conduct were all experienced in other states.

Plaintiff attests that "[t]he scoring and statistical analysis that was conducted for the PPLT examination most likely occurred in New Jersey as a greater portion of all of ETS's Centers, including those for Statistical Analysis and Assessment Design and Scoring are located at ETS's headquarters in Princeton, New Jersey and therefore nearly all of the tortuous conduct complained of in those proceedings occurred there." (emphasis added). While that assertion may be borne out in discovery, it has not been confirmed at this stage of the litigation, and the only definitive connection between

plaintiff's claims and New Jersey at present is that ETS's principal place of business is in Princeton. That fact alone is insufficient to deny the requested dismissal or stay. In Bass v. DeVink, 336 N.J. Super. at 455, the Appellate Division affirmed a stay entered by the trial court where a previously-filed case was pending in Delaware Chancery Court. The Bass Court explained: "Although Warner-Lambert and American Home Products have a strong presence in New Jersey, the subject of the litigation and the relief sought have no particular nexus to this state." Id. at 457. The lack of connection between the litigation and New Jersey, combined with the fact that both defendant corporations were incorporated in Delaware where that state's Chancery Court has widely acknowledged special expertise in shareholder litigation, convinced the Bass Court that there were no special equities warranting a refusal to stay the case. Id. at 457-58. Here, as in Bass, ETS's "strong presence" in New Jersey is not enough to warrant allowing a duplicative lawsuit to proceed here.

Similarly, the court in Exxon, 341 N.J. Super. at 516-17, concluded that the establishment of a principal place of business in New Jersey for a company incorporated elsewhere does not, in and of itself, create a sufficient nexus to proceed in this state in the face of previously filed litigation where the subject matter of the lawsuit and the damages occurred

elsewhere. There a technology was developed in New Jersey, but installed and operated in another jurisdiction, where it was alleged to have caused a serious industrial fire. The Appellate Division held, as had the trial court, that the fact that the technology was developed in this state was offset "by the simple fact that the final application and focus of the technology" was at the site of the fire in another jurisdiction. Id. at 517. In this case, therefore, even if plaintiff Kathleen Jones can eventually show that the Praxis test was developed in New Jersey, the fact that the test was administered in Louisiana to the named plaintiff who was then a Louisiana resident, that the results were reported to education authorities in Louisiana and other states but not in New Jersey, and that plaintiff was thus not certified to teach in Louisiana and thus sustained her damages there, all support the conclusion that this New Jersey court should stay its consideration of the case in favor of the federal multidistrict litigation recently assigned to proceed in Louisiana.

Fairness to the parties also requires that this court yield to the first-filed action. In general, New Jersey's public policy seeks to protect its residents, and to deny the stay in this matter would thwart that public policy by forcing ETS to defend itself simultaneously in two separate class action suits in two separate forums. Not only will simultaneous lawsuits

place great burden and expense upon defendant, but it will also utilize this court's time, for a duplicative action, contrary to New Jersey's public policy of conserving judicial resources. "The stay advances our strong policy of avoiding vexatious and oppressive multiple litigation in different jurisdictions." Bass, 336 N.J. Super. at 458; Exxon, 341 N.J. Super. at 517-18.

Plaintiff further argues that she will receive quicker relief in this action than she would in the federal actions because discovery is already underway here. However, discovery has just begun in this matter, as plaintiff served ETS with discovery requests and interrogatories on September 10, 2004. ETS should not be forced to defend itself in two simultaneous litigations simply because discovery is moving "quicker" in the New Jersey case. Moreover, the multidistrict court has now conferenced the case and initiated a coordinated discovery process. It is not at all clear, therefore, that the New Jersey state case could be concluded any quicker than the parallel federal actions. In any event, staying this court's hand where there is a comprehensive, coordinated discovery process now begun in Louisiana would conserve judicial resources and promote sound judicial administration.

Lastly, plaintiff argues that the forum non conveniens analysis applies when determining whether special equities exist. However, the court in American Home Products

specifically compared the principles of comity and forum non conveniens, and stated, at 286 N.J. Super. at 35:

> Forum non conveniens and comity are separate concepts and the reasoning animating each, though somewhat overlapping, is distinct . . . .The general rule favors stay or dismissals in comity-stay situations, in the absence of special equities. The general rule in a forum non conveniens analysis favors retention of jurisdiction, unless the forum is manifestly inappropriate.

The court further explained:

> The insurers are correct in reasoning that "special equities" should not simply be interchangeable with the forum non conveniens factors; doing this effectively transforms a comity-stay analysis into a forum non conveniens analysis, equating the two. However, the insurers' contention that forum non conveniens factors are "wholly irrelevant" is not correct. Considerations such as convenience and fairness to the parties, as well as connections with the respective forums, could, in a particular case, give rise to special equities. The difference in a comity analysis is that these factors should be examined, not to determine if litigation in the forum is generally appropriate, but to determine whether a particular case presents specific facts making a stay in New Jersey unjust to the interests of the parties or an unfair and inefficient use of the courts of this State. [Id. at 39.]

Therefore, while a strict forum non conveniens analysis should not be used to determine special equities, a court may borrow some of the considerations from that analysis. Such considerations are the fairness and convenience to the parties. In staying this action, plaintiff will not be prejudiced because she is not a New Jersey resident. Whether this litigation occurs in New Jersey state court or in the Eastern District of

Louisiana, plaintiff will have to travel from Georgia to another jurisdiction. Plaintiff argues that ETS's centers and employees are in New Jersey and thus the litigation should remain in New Jersey for the sake of those potential witnesses. However, litigation is already pending in federal court, and those ETS employees that are targeted as witnesses will be forced to travel to Louisiana anyway. ETS, furthermore, sought to have the matters managed in Louisiana and has agreed to whatever inconveniences that forum might present. Fairness and convenience to the parties thus support this court's staying its hand.

ETS has moved to either stay this case or dismiss the complaint without prejudice. Now that the MDL Panel has consolidated the federal actions in Louisiana, and that matter is proceeding, this court will dismiss the complaint of Kathleen Jones without prejudice to her reinstating it, if appropriate, following the conclusion of the parallel federal proceedings. A dismissal without prejudice rather than a stay makes more sense as a matter of judicial administration because it is unclear how long the federal litigation will take to conclude, as it could conceivably extend beyond the length of a typical stay. As the court noted in Exxon, 341 N.J. Super. at 519, "a dismissal subject to affording a plaintiff the right to reopen, depending upon future events, is a proper disposition when exercising

discretionary power to yield to an earl[ier] filed action." Of course, the dismissal without prejudice preserves the plaintiff's claims as of the filing of the original complaint, so that statute of limitations concerns have been satisfied. The court thus will grant defendant ETS's motion to dismiss the complaint without prejudice.